A

Chua Ah Meng & Anor v Tian Kon Siong

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(W)-886–06 OF 2015
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
24 JUNE 2019

C *Civil Procedure — Appeal — Findings of facts — Whether trial judge's decision not supported by his findings of facts — Whether on finding that land transfer documents were not tainted by misrepresentation or forgery trial judge should have concluded that transfer of land valid and that transferee had acquired indefeasible title — Whether trial judge's holding that the transfer of the land not a genuine sale*
D *and purchase transaction but was to secure a money-lending transaction perverse*

The respondent ('Tian'), who had a business known as Alam Rimba Resources ('Alam Rimba') owned a piece of land ('the land') which he agreed to sell to the second appellant ('Webson') for RM3m. Tian executed the land transfer form
E ('Form 14A') and a power of attorney ('PA') and after receiving RM2,820,000 towards the sale price of the land, handed over the land's original title deed to the first appellant ('Chua'). Tian, however, contended that the title deed was handed to Chua as security for loans that Chua had given him. On Tian's representation that it was lucrative for Chua to invest in Alam Rimba as it had
F obtained a concession to extract timber ('the concession'), Chua joined Alam Rimba and invested monies to realise the concession project. Tian and Chua also entered into a memorandum of agreement ('MOA'). Tian contended that Chua had promised to pay him RM16m if he (Tian) resigned from Alam Rimba. Tian later sued Chua for breach of that promise and sought the return
G of the title deed to the land. On finding that the land had been transferred to Webson, Tian added Webson as co-defendant to the suit and claimed that the transfer of the land to Webson was void and illegal because the instrument used to effect the transfer was obtained by misrepresentation and/or forgery. Chua counterclaimed for damages suffered from his investment in the concession as
H a result of relying on Tian's representations which were subsequently found to be false and fraudulent. Following a trial, the High Court dismissed Chua's counterclaim and ordered the land to be returned to Tian and to be registered in his name after cancelling Webson as the owner thereof. The court found, inter alia, that: (a) Tian had received RM16m from Chua; (b) Chua had not
I made any false representations to Tian; and (c) the transfer of the land was to secure loans given by Chua to Tian and the appellants were obliged to return the land to Tian following the execution of the MOA. The appellants appealed against the dismissal of Chua's counterclaim and the order to return the land to Tian and for him to be registered as the owner thereof. Tian raised a

cross-appeal against the dismissal of his RM16m claim against Chua. At the hearing of the appeals, the appellants raised the preliminary objection ('PO') that Tian's cross-appeal should be struck out for not having any bearing to the subject of the appellants' appeal. The appellants said if Tian was aggrieved over the dismissal of his RM16m claim, he should have filed a separate notice of appeal against that decision.

Held, unanimously upholding the PO and striking out Tian's cross-appeal, setting aside the High Court's decision, allowing Chua's counterclaim and ordering the trial judge to assess the damages payable to Chua in the counterclaim:

(1) Following the decision of the Federal Court in *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557, Tian's cross-appeal was incompetent and had to be struck out (see para 27).

(2) Since the trial judge had made a finding that Tian's signatures in the sale and purchase agreement and the PA were genuine and that there was no evidence of misrepresentation by Chua, he ought to have concluded that the transfer of the land to Chua and thereafter from Chua to Webson was valid and that Webson had acquired an indefeasible title to the land under s 340 of the National Land Code (see para 40).

(3) The trial judge's conclusion that the transfer of the land to Chua was not pursuant to a genuine sale and purchase transaction but was a form of security for loans was contrary to his finding that Tian had signed the transfer forms with full knowledge and that there was no evidence that Tian had been induced by any misrepresentation made by the appellants. The trial judge failed to appreciate that there was cogent and credible evidence that the sale and purchase transaction between the parties concerning the land was genuine and that it was not a transaction where the land was used as a security for loans from Chua to Tian. The MOA had nothing to do with the land and was a separate transaction concerning Alam Rimba (see paras 29–35 & 44).

(4) The trial judge correctly found that Tian's allegation that his signatures in the sale and purchase agreement and the Form 14A had been forged was unsubstantiated. The document examiner, to whom the disputed documents were sent for verification, was never called to testify on the authenticity of the signatures on the documents, nor was a report from him tendered in evidence. The trial judge was right to draw adverse inference under s 114(g) of the Evidence Act 1950 against Tian for failing to call the document examiner as a witness or to produce his report (see paras 36–38).

(5) The grounds of judgment showed that the trial judge had dismissed Chua's counterclaim simply on the ground that it had become academic.

The judge had not given the counterclaim due consideration and had failed to evaluate the oral and documentary evidence that Chua had adduced to support his counterclaim. On balance of probabilities, there was sufficient evidence to prove Chua's counterclaim. It was therefore allowed and the trial judge was ordered to assess the damages payable in respect of the same (see paras 47 & 55).

[Bahasa Malaysia summary

Responden ('Tian') yang mempunyai sebuah perniagaan yang dikenal sebagai Alam Rimba Resources ('Alam Rimba') mempunyai sebuah hartanah ('hartanah tersebut') yang mana beliau telah bersetuju untuk menjual kepada perayu kedua ('Webson') dengan harga RM3 juta. Tian telah melaksanakan borang pindahmilik ('Borang 14A') dan surat wakil kuasa ('SWK') dan setelah menerima RM2,820,000 terhadap harga jualbeli hartanah tersebut, menyerahkan surat ikatan hakmilik asal hartanah tersebut kepada perayu pertama ('Chua'). Tian, walau bagaimanapun, menyatakan bahawa surat ikatan hakmilik telah diserahkan kepada Chua sebagai sekuriti untuk pinjaman yang telah Chua berikan kepada beliau. Berpandukan kepada representasi oleh Tian bahawa ianya akan memberikan keuntungan kepada Chua untuk melabur di dalam Alam Rimba kerana telah berjaya mendapatkan konsesi untuk mengekstrak kayu balak ('konsesi tersebut'), Chua telah menyertai Alam Rimba dan melaburkan wang untuk merealisasikan projek tersebut. Tian dan Chua juga telah memasuki memorandum persefahaman ('MOA'). Tian menyatakan bahawa Chua telah berjanji untuk membayar kepada beliau sebanyak RM16 juta sekiranya beliau (Tian) meletak jawatan daripada Alam Rimba. Tian kemudianya menyaman Chua kerana kemungkiran perjanjian tersebut dan memohon untuk pemulangan semula surat ikatan hakmilik hartanah tersebut. Apabila mendapat tahu bahawa hartanah tersebut telah dipindahmilik kepada Webson, Tian menambah Wesbon sebagai defendan bersama bagi tuntutan tersebut dan menuntut supaya pindahmilik hartanah kepada Webson adalah tidak sah serta menyalahi undang-undang kerana instrumen yang digunakan untuk menjalankan pindahmilik telah diperolehi secara representasi salah dan/atau pemalsuan. Chua membuat tuntutan balas untuk ganti rugi yang dialami daripada pelaburan konsesi berdasarkan kepada bergantungan terhadap representasi salah yang dibuat oleh Tian yang seterusnya didapati adalah palsu dan menipu. Setelah melalui perbicaraan, Mahkamah Tinggi telah menolak tuntutan balas Chua dan memerintahkan hartanah tersebut supaya dikembalikan kepada Tian dan didaftar di atas nama beliau selepas membatalkan pemilikan oleh Webson. Mahkamah mendapati, antara lain, bahawa: (a) Tian telah menerima RM16 juta daripada Chua; (b) Chua tidak pernah memberikan representasi salah kepada Tian; and (c) pindahmilik hartanah tersebut adalah untuk mendapatkan pinjaman yang diberikan oleh Chua kepada Tian dan perayu adalah bertanggungan untuk memulangkan hartanah tersebut kepada Tian setelah MOA dilaksanakan. Perayu merayu terhadap penolakan tuntutan balas

oleh Chua dan perintah supaya hartanah dikembalikan kepada Tian dan untuk dia didaftarkan sebagai pemilik. Tian membangkitkan rayuan silang terhadap penolakan tuntutan berjumlah RM16 juta terhadap Chua. Ketika pendengaran rayuan, perayu membangkitkan bantahan awal ('BA') bahawa rayuan silang oleh Tian ditolak kerana tidak menjadi asas kepada rayuan perayu. Perayu menyatakan bahawa sekiranya Tian terkilan terhadap penolakan tuntutan RM16 juta, beliau haruslah memfailkan notis rayuan yang berasingan daripada keputusan tersebut.

Diputuskan, menegakkan BA dan menolak rayuan silang oleh Tian, menolak keputusan Mahkamah Tinggi, membenarkan tuntutan balas Chua dan memerintahkan hakim perbicaraan untuk menilai ganti rugi yang akan dibayar kepada Chua di dalam tuntutan balas:

(1) Berdasarkan kepada keputusan Mahkamah Agung di dalam kes *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557, rayuan silang oleh Tian adalah tidak sempurna dan haruslah ditolak (lihat perenggan 27).

(2) Setelah hakim perbicaraan membuat dapatan bahawa tandatangan Tian di dalam perjanjian jual beli dan PA adalah sah dan tiada bukti representasi salah oleh Chua, beliau seharusnya memutuskan bahawa pindahmilik hartanah kepada Chua dan seterusnya daripada Chua kepada Webson adalah sah dan Webson telah mendapat milikan yang tidak boleh disangkal di bawah s 340 Kanun Tanah Negara (lihat perenggan 40)

(3) Rumusan hakim perbicaraan bahawa pindahmilik hartanah kepada Chua adalah bukan jual beli yang sah dan transaksi pembelian tetapi adalah suatu bentuk sekuriti terhadap pinjaman adalah bercanggah terhadap dapatan beliau yang mana Tian telah menandatangani borang pindahmilik dengan pengetahuan penuh dan tiada bukti bahawa Tian telah diperdaya oleh representasi salah yang dibuat oleh perayu. Hakim perbicaraan telah terkhilat apabila gagal mengambil kira terdapat bukti yang meyakinkan dan boleh dipercayai bahawa transaksi jual beli di antara pihak-pihak berhubung hartanah tersebut adalah tulen dan ianya bukanlah transaksi di mana hartanah digunakan sebagai sekuriti untuk mendapatkan pinjaman daripada Chua kepada Tian. MOA tersebut tidak mempunyai sebarang kaitan dengan hartanah dan ianya adalah transaksi yang berasingan mengenai Alam Rimba (lihat perenggan 29–35 & 44).

(4) Hakim perbicaraan telah dengan tepat mendapati bahawa dakwaan Tian bahawa tandatangan beliau di dalam perjanjian jual beli dan Borang 14A telah dipalsukan adalah tidak berasas. Pemeriksa dokumen, yang mana dokumen yang dipertikai telah dihantar untuk pengesahan, mahupun laporan daripada beliau tidak dijadikan bukti keterangan. Hakim

perbicaraan adalah tepat apabila membuat kesimpulan di bawah s 114(g) Akta Keterangan 1950 terhadap Tian kerana gagal untuk memanggil pemeriksa dokumen sebagai saksi atau untuk memberikan laporan beliau (lihat perenggan 36–38).

(5) Alasan penghakiman menunjukkan bahawa hakim perbicaraan telah menolak tuntutan balas hanya dengan alasan bahawa ianya telah menjadi akademik. Hakim tidak memberikan tuntutan balas tersebut pertimbangan yang wajar dan telah gagal untuk menilai keterangan oral dan bukti-bukti dokumentasi yang telah diberikan oleh Chua untuk menyokong tuntutan balas beliau. Berdasarkan imbangan kebarangkalian, terdapat keterangan yang mencukupi untuk membuktikan tuntutan balas oleh Chua. Ianya kemudian telah dibenarkan dan hakim perbicaraan telah diperintahkan untuk menilai ganti rugi untuk dibayar sama sekali (see perenggan 47 & 55).]

Notes

For a case on findings of facts, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1395.

Cases referred to

Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng [2005] 2 MLJ 1, FC (refd)
Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557; [2016] 8 CLJ 149, FC (folld)
Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu [2015] 4 MLJ 543, CA (refd)
Rajamani a/p Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors [2016] 5 MLJ 557; [2016] 4 CLJ 510, CA (distd)
Sajan Singh v Sardara Ali [1960] 1 MLJ 52, PC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Moneylenders Act 1951 ss 15, 51
National Land Code s 340, Form 14A
Rules of the Court of Appeal 1994 r 8(1)

Appeal from: Civil Suit No 22–30 of 2011 (High Court, Kota Bharu)

Cecil Abraham (Sunil Abraham, Alex Tan Chie Sian and PL Cheah with him) (Wong Kian Kheong) for the appellant.
Adrian a/l Silvarajoo (Muhamad Atif bin Abdullah with him) (Ramli Yusuff & Co) for the respondent.

Badariah Sahamid JCA (delivering judgment of the court):

INTRODUCTION

[1] For ease of reference parties will be referred to as they were in proceedings before the High Court.

[2] This is an appeal against part of the decision of the learned High Court judge delivered on 5 May 2015 after a full trial, where the learned judge made the following orders:

(a) the second defendant be registered as the owner of a piece of land held under Geran Mukim No 2538, Lot No 1299, Bandar Kluang, Daerah Kluang, Negeri Johor ('Kluang land') in the capacity of a trustee only;

(b) the defendants to return the Kluang land to the plaintiff, whereby the registration of the second defendant as the registered owner be cancelled and the plaintiff be registered as the registered owner;

(c) in the event of a failure of the second defendant to execute the transfer of the Kluang land to the plaintiff, the senior assistant registrar to execute the transfer form on behalf of the second defendant;

(d) the defendants' counterclaim be dismissed; and

(e) each party to bear their own costs.

CHRONOLOGY OF EVENTS

[3] The chronology of events leading to the dispute between the parties were set out in the defendants' submissions.

[4] The plaintiff is the registered owner of the Kluang land. On 26 June 2007, the plaintiff had registered Alam Rimba Resources ('Alam Rimba') as a business enterprise under the name of one of the plaintiff's employees, Syed Alwi bin Syed Omar.

[5] On 29 April 2008, the plaintiff and the second defendant entered into a sale and purchase agreement in respect of the Kluang land for a consideration of RM3m. The plaintiff executed two Forms 14A and a power of attorney on the same day ie 29 April 2008. The plaintiff had received the amount of RM2,820,000 The original issue document of title of the Kluang land was given to the first defendant.

[6] On 13 July 2008, the plaintiff's brother, Tian Chee Chon and the plaintiff's son, Tian Chuan Sen joined Alam Rimba. Thereafter, on 14 July 2008, Syed Alwi resigned from Alam Rimba.

A [7] On 26 March 2009, Kompleks Perkayuan Kelantan Sdn Bhd ('KPK') issued a letter awarding Alam Rimba a concession to extract timber from 10,000 acres of land. KPK also entered into a formal agreement with Alam Rimba on the same day.

B [8] On 1 April 2009, the plaintiff and the first defendant joined Alam Rimba whereas Tian Chee Chon resigned from Alam Rimba. On 2 April 2009, Tian Chuan Sen also resigned from Alam Rimba. On 23 April 2009, the plaintiff resigned from Alam Rimba.

C [9] On 27 April 2009, the plaintiff and the first defendant entered into a memorandum of agreement in respect of Alam Rimba ('MOA').

[10] On 11 January 2011, the plaintiff, through his solicitors, Messrs Zainal
D & Mariani, demanded from the first defendant a sum of RM16m and the return of the issue document of title to the Kluang land.

[11] On 27 February 2011, the plaintiff commenced proceedings against the first defendant in the Kota Bharu High Court.

E [12] On 6 September 2011, the Kluang land was transferred to the second defendant. On 10 November 2013, the plaintiff amended his claim by joining the second defendant as a party to the proceedings in the Kota Bharu High Court.

F

THE PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT

[13] The crux of the plaintiff's claim against the first defendant as set out in
G the amended statement of claim is as follows:

(a) the first defendant had allegedly promised to lend a sum of RM16m to the plaintiff on condition that the plaintiff withdraws himself from Alam Rimba;

H (b) upon the plaintiff withdrawing from Alam Rimba, the first defendant promised to return the issue document of title ('IDT') to the Kluang land to the plaintiff. It was alleged that the IDT to the Kluang land was given to the first defendant as security for earlier loans made by the first defendant to the plaintiff; and

I (c) the plaintiff had withdrawn himself from Alam Rimba on the defendant's representations. However, the first defendant did not lend the plaintiff the sum of RM16m as promised.

THE PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT

[14] The plaintiff's claim against the second defendant is premised on the transfer of the Kluang land to the second defendant. The plaintiff alleged that the said transfer is void and illegal because the instrument of transfer was obtained by misrepresentation and/or forgery.

THE FIRST DEFENDANT'S COUNTERCLAIM AGAINST THE PLAINTIFF

[15] The first defendant alleged that the first defendant was induced by the plaintiff through various representations to invest in Alam Rimba. These representations were discovered to be false or fraudulently made. As a result of the false representations and fraud, the first defendant had suffered loss and damage.

PROCEEDINGS BEFORE THE HIGH COURT

[16] In his grounds of judgment, the learned judge was of the view that there were two main issues to be determined by the court:

(a) whether the first defendant had paid the entire concession sum of RM16m to the plaintiff? and

(b) whether the transfer of ownership of the Kluang land from the plaintiff to the first defendant is pursuant to a sale and purchase transaction or is a form of security for a loan transaction?

[17] On the issue of whether the first defendant had paid the entire concession sum of RM16m to the plaintiff, the learned judge made the following findings:

(a) the first defendant had paid the entire concession sum to the plaintiff;

(b) the memorandum of agreement ('MOA') entered into by the plaintiff and the first defendant on 27 April 2009 is binding on both parties. The MOA was signed with the consent of both parties. There was no false representation from the first defendant;

(c) the terms of the MOA are clear. Paragraph 1 confirms that the plaintiff had received the payment of RM16m from the first defendant. The plaintiff was given until the end of October to transfer the concession to the first defendant in the event that the plaintiff fails to fulfil his obligations. As a consequence of the plaintiff's failure to fulfil his obligations, the first defendant became entitled to the concession in its entirety;

(d) the plaintiff himself had admitted receiving the payment of almost RM16m. The plaintiff's allegation that the RM16m had not been paid is false;

(e) the first defendant had given the first loan to the plaintiff in the sum of RM3m and thereafter, RM5m. Subsequently, the plaintiff had also received payment from the first defendant which was admitted by the plaintiff, the total amount being RM16m. The loan was valid and was confirmed by the MOA. The issue of illegality of the agreement is not pertinent in this case; and

(f) the first defendant is the owner of the concession.

[18] The second issue is whether the transfer of ownership of the Kluang land from the plaintiff to the first defendant is pursuant to a sale and purchase transaction or furnished as security for a loan given by the first defendant to the plaintiff? The learned judge made the finding that the transfer of the Kluang land was a form of security for loans given by the first defendant to the plaintiff.

[19] The decision of the learned judge on this issue was premised on the findings as follows:

(a) the purchase price of the Kluang land is RM3m. The first loan given by the first defendant to the plaintiff is also RM3m. The transfer of ownership was executed as soon as the first defendant paid the plaintiff. The first defendant had entered a caveat on the Kluang land after the payment of the first loan;

(b) the first defendant did not send an assessment to the stamp office. There were two sets of Form 14A with two different dates;

(c) the transfer was only remitted to the land office after the plaintiff filed this writ;

(d) the transfer was sent to the land office after three police reports were made by the plaintiff;

(e) the plaintiff had signed both Forms 14A with full knowledge. There were no false representations by the defendants; and

(f) the transfer of the Kluang land by the plaintiff to the first defendant and the signing of the Form 14A were done as a security for the loans provided by the first defendant to the plaintiff. After the MOA was executed, the defendants were obliged to return the Kluang land to the plaintiff who was registered in the capacity of trustee.

[20] On the grounds stated above, the learned trial judge made the finding that the transfer of the Kluang land was a form of security for loans provided by

the first defendant to the plaintiff. The learned judge ordered the defendants to return the Kluang land to the plaintiff and for the registration of the second defendant as the registered owner be cancelled and the plaintiff be registered as the registered owner.

JUDGMENT OF THE COURT

[21] Before us we have an appeal against part of the decision of the learned judge, an appeal against the dismissal of the first defendant's counterclaim and a cross-appeal by the plaintiff.

[22] The appeal by the appellants/defendants is against the part of the decision of the learned judge ordering the defendants to return the Kluang land to the plaintiff and that the said land be registered in the name of the plaintiff. The appeal against the dismissal of the first defendant's counterclaim is premised on allegations of false representations by the plaintiff that caused the first defendant to suffer loss and damages. The plaintiff's cross-appeal before us is against a part of the decision of the learned judge who dismissed the plaintiff's claim for RM16m against the first defendant.

CROSS-APPEAL

Preliminary objection

[23] The defendants/appellants have raised a preliminary objection ('PO') against the plaintiff/respondent's cross-appeal on the following grounds.

[24] The defendants submit that it is now settled law that any cross-appeal must be restricted to vary only that part of the decision that was being appealed against and not any other parts of the decision that does not form the subject of the appeal. Rule 8(1) of the Rules of the Court of Appeal 1994; *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu* [2015] 4 MLJ 543 (CA); *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557; [2016] 8 CLJ 149 (FC). Thus the cross-appeal of the plaintiff is wrong in law and ought to be struck out.

[25] The defendants' appeal is only against a part of the decision of the learned judge, namely in respect of the learned judge's findings on the Kluang land as well as the first defendant's counterclaim. On the other hand, the plaintiff's cross-appeal is in respect of the learned judge's findings on the plaintiff's claim for RM16m against the first defendant. Thus, the subject of the plaintiff's cross-appeal can only be pursued by filing a separate notice of appeal.

[26] In response to the defendants' objections the plaintiff had relied on the case of *Rajamani a/p Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors* [2016] MLJU 67; [2016] 4 CLJ 510, in support of their argument that as the issues in the main appeal and cross-appeal are inter related, the cross-appeal is proper and competent to be brought with the main appeal.

[27] After due consideration of learned counsels' submissions and relevant authorities, we agreed with the submissions of learned counsel for the defendants that *Rajamani*'s case can be distinguished from the instant case. In addition, we are bound by the Federal Court's decision in *Leisure Farms*. We therefore allowed the defendants' PO. We agreed with the submissions of the defendants that there was no competent cross-appeal before us. The plaintiff's cross-appeal was struck out.

The main appeal

[28] After careful consideration of learned counsels' written and oral submissions as well as the appeal records, we are of the view that there are merits in this appeal that warrant appellate intervention. We give our reasons as follows.

Sale and purchase or security for a loan?

[29] The learned judge had made findings that the plaintiff had signed both Forms 14A with full knowledge and there was no evidence that the plaintiff had been induced by representation by the defendants. Premised on such findings, the learned judge had taken a position that seems contrary to his findings abovementioned when he concluded that the transfer of the Kluang land to the first defendant was not pursuant to a genuine sale and purchase transaction between the plaintiff and the first defendant, but was a form of security for loans.

[30] There was cogent and credible evidence of a genuine sale and purchase transaction between the parties which the learned judge had failed to appreciate. Among them are these: The defendants had paid a total amount of RM2,820,000 to the plaintiff. The relevant conveyancing documentation had been prepared by solicitors. They include the following: the sale and purchase agreement, two sets of Form 14A and the power of attorney.

[31] In addition, the plaintiff had executed the conveyancing documents in the presence of DW2 (Encik Mohd Faisul bin Lasri) and DW5 (Mr Edward Chin Chow Foo), both of whom are practising advocates and solicitors of the High Court of Malaya.

[32] DW2 had testified that he had witnessed the execution of the SPA and the Forms 14A by the plaintiff. DW2 had also attested the execution of the power of attorney by the plaintiff, and signed the certificate of authentication. A

[33] In addition, DW5 had testified that he had explained the contents of the SPA to the plaintiff, and had witnessed the plaintiff signing the SPA and Forms 14A. DW5 had also testified that he had explained the contents of the power of attorney to the plaintiff and had witnessed the plaintiff signing the power of attorney. B

[34] The sale and purchase transaction in respect of the Kluang land was concluded on 29 April 2008, and the IDT of the Kluang land was handed to the first defendant on the same day. C

[35] From the facts and circumstances of the instant case, we are of the considered view that the transaction between the plaintiff and the first defendant was pursuant to a sale and purchase transaction in respect of the Kluang land. The MOA entered into between the parties was a separate transaction concerning Alam Rimba. The learned judge had failed to consider that the MOA made no reference whatsoever to the Kluang land. Thus, the learned judge had erred in his failure to appreciate that the transaction in respect of the Kluang land was separate and distinct from the MOA. D E

[36] The plaintiff's pleaded case was that the signatures of the plaintiff on the SPA and the Forms 14A were forged. In our view, the learned judge had made the correct finding that the plaintiff's allegation of forgery was unsubstantiated. Other than the first defendant's testimony that he had witnessed the plaintiff signing the Forms 14A, DW2 and DW5, two disinterested witnesses had testified to witnessing the signing of the SPA by the plaintiff. In the case *Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng* [2005] 2 MLJ 1 at 19B–20G, the Federal Court had accepted the direct evidence of a disinterested witness as to the genuineness of the execution of a document. F G

[37] To prove the plaintiff's allegation of forgery of the plaintiff's signatures on the SPA and the power of attorney, the plaintiff's witness, PW2 (Encik Nor Hisham bin Hashim) testified that the disputed conveyancing documents had been submitted to the Department of Chemistry to verify the signatures on the disputed documents. However, the document examiner, Encik Iskandar bin Azman was never called as a witness to testify on the authenticity of the signatures on the disputed documents. Neither was a report by Encik Iskandar tendered as evidence. H I

[38] In the circumstances, the learned judge was right to draw an adverse inference pursuant to s 114(g) of the Evidence Act 1950 against the plaintiff

when he failed to call Encik Iskandar as a witness or to produce Encik Iskandar's report.

[39] The learned judge was therefore correct in his finding that the signatures on the disputed conveyancing documents were the genuine signatures of the plaintiff.

[40] Since the learned judge had made the finding that the plaintiff's signatures on the SPA and the power of attorney were genuine and there was no evidence of misrepresentation by the first defendant to the plaintiff, the learned judge ought to have concluded that the transfer of the Kluang land from the plaintiff to the first defendant was valid and consequently, the subsequent transfer of the land to the second defendant was also valid. As a result, the second defendant had acquired indefeasible title the land pursuant to s 340 of the National Land Code.

Illegality

[41] The learned judge had made a finding that the transaction between the plaintiff and the first defendant was not a genuine sale and purchase transaction in respect of the Kluang land, but rather a loan transaction in which the plaintiff had transferred the Kluang land to the first defendant as security for loans provided by the first defendant to the plaintiff.

[42] On the assumption that the transaction abovementioned was a security for the loan, as was found by the learned judge, the transaction would be a money lending transaction. Thus, it would mean that the plaintiff who is not a licensed moneylender would then run foul of s 15 of the Moneylenders Act 1951 which provides as follows:

> No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

[43] The effect of s 51 abovementioned is that any purported moneylending agreement between the plaintiff and the first defendant would be void for illegality. However, learned counsel for the defendants submitted that the learned judge had failed to appreciate the effect of his finding in relation to the abovementioned provision in the Moneylenders Act 1951. Learned counsel for the defendants submitted that if that were the case, since the transaction had been fully executed, the property to the Kluang land would effectively pass to the first defendant notwithstanding the illegality. In the case of *Sajan Singh v Sardara Ali* [1960] 1 MLJ 52, the Privy Council had made the observation that in respect of illegal agreements, 'let the estate lie where it falls'.

[44] However, since we have made the finding that the transaction involving the Kluang land is a genuine sale and purchase transaction between the plaintiff and the first defendant, and not a transaction in which the Kluang land was utilised as a security for loans from the first defendant to the plaintiff, the issue of moneylending does not arise.

[45] We therefore had allowed the appeal of the defendants and set aside the decision of the learned judge in respect of the Kluang land.

Counterclaim

[46] In his counterclaim before the High Court, the first defendant had alleged that the first defendant was induced by the plaintiff through various representations to invest in Alam Rimba. These representations were discovered to be false or fraudulently made. As a result of the false representations and fraud, the first defendant alleged that he had suffered loss and instituted the counterclaim to seek damages.

[47] The learned judge had dismissed the first defendant's counterclaim on the grounds that the subject had become academic. In his 'grounds of judgment' it was stated, in sparse terms as follows:

> [12] Saya juga menolak tuntutan balas defendan-defendan atas alasan perkara tersebut telah menjadi akademik.

There was no analysis of the subject matter of the counterclaim or reasons given by the learned judge as to the basis for arriving at the abovementioned conclusion.

[48] According to the submissions of learned counsel for the first defendant, the subject matter of the counterclaim is as follows: In 2008, the plaintiff had invited the first defendant to invest in a timber logging project. The plaintiff had represented to the first defendant that:

(a) Mutiararis Trading Sdn Bhd ('MTSB'), a company owned by the plaintiff, had obtained a timber concession from Kompleks Perkayuan Kelantan ('KPK') to extract timber from 10,000 acres of land ('the plaintiff's first representation'); and

(b) the said timber concession was a very lucrative investment because the concession area was filled with good quality timber ('the plaintiff's second representation').

[49] The first defendant had relied on the plaintiff's first and second representations abovementioned and had agreed to invest in the said timber

project. Monies were given by the first defendant to the plaintiff as investment in the timber project.

[50] Subsequently, the first defendant was made a director of MTSB and given 25% of the shareholding in MTSB. The first defendant continued to invest monies in the said timber project.

[51] It was only later that the first defendant discovered that the timber concession was not given to MTSB but to Alam Rimba. The plaintiff had explained to the first defendant that he had made a mistake and agreed to make the first defendant and subsequently the first defendant's wife as partners in Alam Rimba. After the first defendant was made a partner in Alam Rimba, the first defendant made further investment in the timber project.

[52] On 27 April 2009, the plaintiff and the first defendant entered into the MOA wherein the plaintiff guaranteed among others, that the first defendant could make a profit of not less than RM26m by October 2009 from the timber concession.

[53] The first defendant had suffered loss and damages in reliance on the plaintiff's representations on the timber project. In particular, the first defendant had incurred the following expenses:

(a) payment of RM1.6m to KPK for approval to enter certain parts of the concession areas;

(b) payment of RM473,280 to the Forestry Department of Kelantan to pave the path leading to the concession area and payment of premiums;

(c) payment of RM50,000 as legal fees for the agreement between Alam Rimba and KPK for the timber concession; and

(d) purchase of various machineries and equipment for the purpose of extracting timber.

[54] In response to the first defendant's counterclaim, the plaintiff's submissions can be summarised as follows: There was no misrepresentation on the part of the plaintiff or any inducement by the plaintiff that was relied on by the first defendant in his decision to invest in the timber project. The first defendant was made a partner of MTSB and later Alam Rimba and was in a position to verify details of the timber concession and the quality of the timber with KPK but had failed to do so.

[55] In our considered view, the learned judge had failed to give due consideration to the first defendant's counterclaim before dismissing it as academic. The learned judge had failed to evaluate the oral and documentary

evidence adduced by the first defendant to support their counterclaim. Had the learned judge properly evaluated the evidence adduced before him, he would not have dismissed the counterclaim as he did. On the balance of probabilities, we are of the considered view that there is sufficient evidence to prove the first defendant's counterclaim. We had therefore allowed the counterclaim with costs and interest and order the assessment of damages to be undertaken by the same High Court judge who had conducted the trial.

[56] To summarise, we had made the following orders:

(a) the plaintiff/respondent's cross-appeal is struck out with costs;

(b) the defendants/appellant's main appeal in respect of the Kluang land is allowed with costs. The decision of the learned judge is set aside; and

(c) the counterclaim of the first defendant/first appellant is allowed with costs and interest. The decision of the learned judge is set aside. The case is remitted to the same High Court judge for assessment of damages.

Order accordingly.

Reported by Ashok Kumar